

# **Exhibit Y**

Hartford Casualty Insurance Company vs. Fireman's Fund Insurance Company, et al.  
Donald Way on 09/16/2016

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

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HARTFORD CASUALTY INSURANCE COMPANY,  
an Indiana Corporation,

Plaintiff,

vs.

No. 3:15CV-02592SI

FIREMAN'S FUND INSURANCE COMPANY, a  
California Corporation' BURNS &  
WILCOX INSURANCE SERVICES, INC., a  
California Corporation; and DOES  
1 to 50,

Defendants.

DEPOSITION OF DONALD WAY

Taken before NICOLE HATLER

CSR No. 13730

September 16, 2016

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1 DEPOSITION OF DONALD WAY

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4 BE IT REMEMBERED, that pursuant to Notice, and on  
5 the 16th day of September 2016, commencing at the hour of  
6 9:58 a.m., in the offices of Wolfe & Wyman LLP, 2175  
7 California Street, Suite 415, Walnut Creek, CA 94596,  
8 before me, NICOLE HATLER, a Certified Shorthand Reporter,  
9 State of California, personally appeared DONALD WAY,  
10 produced as a witness in said action, and being by me  
11 first duly sworn, was thereupon examined as a witness in  
12 said cause.

13 ---oOo---

14 APPEARANCES

15 For the Plaintiff:

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20 For the Defendant Burns & Wilcox:

21 L. SCOTT BRUGGEMANN  
22 Wolfe & Wyman LLP  
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1 For the Cross-Defendant Mosen O'Hadi:

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1 But could he have? Certainly.

2 Q. In the -- the custom and practice in the  
3 industry that you've been testifying, would it be  
4 permissible to sell him that policy if it didn't provide  
5 whatever the standard level of coverage was considered to  
6 be?

7 MR. KASTAN: Vague and ambiguous as to,  
8 "standard level of coverage." I don't know what you mean  
9 by that, Scott.

10 MR. BRUGGEMAN: Well, he's testified that you  
11 have to have some level of coverage commensurate with the  
12 value of the property and --

13 MR. KASTAN: So why don't you rephrase your  
14 question in a way that makes sense?

15 MR. BRUGGEMAN: No. I think it does. We'll let  
16 him have a shot at answering.

17 MR. KASTAN: Then I'll object as to form, and I  
18 don't understand the question. It's unintelligible.

19 THE WITNESS: I did it again. Please, can I  
20 have the question again?

21 BY MR. BRUGGEMAN:

22 Q. I'll restate it. What is the -- what, in your  
23 opinion as an agent of 50-plus years or roughly 50  
24 years --

25 A. Yeah. Don't --

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1 Q. -- would have been the appropriate coverage for  
2 the Broad Beach property at the time Herndon Partners,  
3 LLC, applied for the coverage we've been referring to as  
4 the primary policy on the Broad Beach property?

5 A. Yeah. And that's interesting because it was  
6 actually Herndon, to be technical about it, not Paul, who  
7 initially applied and then they get mixed together, of  
8 course. I think it's well-established that barring a  
9 voluntary undertaking or a holding out or a promise to do  
10 detailed appraisals or to do extra work beyond what's in  
11 custom and practice expected of a retail or insurance  
12 agent or broker to meet the standard of care, that  
13 there's no obligation on that retail agent or broker to  
14 specify an amount of coverage. I think that's  
15 well-established. I think we all agree on that.

16 However, as I mentioned, there can be red flags.  
17 If you have a home on the beach in Malibu which you are  
18 insuring, as I recall for, I want to say a million-five,  
19 something like that, say, the basic building fire  
20 insurance, for example, and you also own four vehicles  
21 including a Porsche and three other expensive cars --  
22 none of which I own -- and you also own 10 or 20  
23 additional residences and you're also a successful real  
24 estate developer and to have a limit of liability  
25 insurance on that beach property, which is obviously to

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1 some extent an attractive nuisance, it's a significant  
2 exposure, of \$300,000 is ridiculous; and standard of care  
3 does require that Mosen O'Hadi would go back to Herndon  
4 or whomever and say, Look, you know, we need to make sure  
5 you have more than \$300,000 of liability insurance.

6 Now, if Herndon and Paul Owhadi come back and  
7 say, We just talked to our lawyers, and we just did this  
8 and that and we want \$300,000 and that's all we're going  
9 to pay for it, go buy it for me, okay, then Mosen's off  
10 the hook. He raised the red flag, waived it up there and  
11 said, Hey, guys, this doesn't make any sense, and the guy  
12 comes back and says, Well, I think it does. I've done  
13 all the research, considered the options, the  
14 alternatives, it's what I want. If you won't sell it to  
15 me, I'll go buy it from someone else. Okay.

16 Now, there might be an extreme case in which  
17 then what the broker should do is say, Go buy it from  
18 somebody else. A former state supreme court justice in  
19 California refused to carry more than minimum limits of  
20 financial responsibility on her personal automobile  
21 insurance policy. Chief justice of the California  
22 Supreme Court. She's driving around with a 15, 30, and  
23 5. You know what I mean? And the poor State Farm agent  
24 who wrote that policy would have his lawyer write this  
25 three-page disclaimer to her for signature every year.



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1 And I kept saying, Why don't you just tell her to go  
2 someplace else? He said, I'm not going to tell the chief  
3 justice of the California Supreme Court to get out of my  
4 office.

5 I mean, okay. So you can have -- obviously  
6 that's a weird unique situation, and you can have such  
7 situations. And if you do, then you just have to be  
8 mature and professional and consider the ramifications as  
9 to how you deal with it. But if there is an obvious red  
10 flag, something that just doesn't make sense -- and I'm  
11 not saying you want to insure the house for a  
12 million-five, and you think it should be insured for two  
13 million. That's not a red flag, just a difference in  
14 valuation.

15 But if something is obviously crazy, then  
16 whoever participates in the processing and the  
17 underwriting and perhaps even the issuing of that  
18 contract, that insurance contract, has a responsibility  
19 to say, Wait, it doesn't make any sense. We need an  
20 explanation before we can proceed.

21 Q. All right.

22 MR. KASTAN: Let's take a little break I have to  
23 go use the restroom.

24 THE WITNESS: Is this a good time --

25 MR. BRUGGEMAN: Off the record.

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1 BY MR. BRUGGEMAN:

2 Q. All right. Is this still your opinion?

3 A. Yes.

4 Q. All right. And I'm -- I'm trying to restate so  
5 I understand, and tell me if I'm -- I'm going in the  
6 wrong direction. Is it your opinion that the excess  
7 policy should have included every entity which had  
8 insurable interest in any property covered by the excess  
9 policy?

10 A. Yes.

11 Q. You state that there's a strong argument to be  
12 made that the excess policy should have been on a  
13 commercial rather than personal form. Is this an opinion  
14 you still hold?

15 A. Yes. You'll notice I did not draw out a firm  
16 conclusion. I just said that a strong argument can be  
17 made that all would have been better served had the  
18 excess been written on a commercial form.

19 Q. You -- your report discusses that it is  
20 axiomatic that the insureds on an excess policy match  
21 precisely the insureds on the underlying primary policies  
22 to the extent of the respected insurable interests. Who  
23 were the insureds on the excess policy?

24 A. I believe --

25 MR. KASTAN: I'm sorry. Calls for a legal

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1 Q. Okay. Does a broker have an obligation to go  
2 over all of the exclusions within a given policy with a  
3 prospective insured?

4 A. No.

5 Q. Okay. And so, when does that obligation ensue?

6 A. That is fact intensive. If the policyholder  
7 asks for a line-by-line review, then you better do it.  
8 Okay? Either that or go pick and find a new broker or  
9 he'll go find a new broker. In some degree, it depends  
10 upon the sophistication in the insurance business of --  
11 of the buyer. If it's John and Mary Smith and Paul and  
12 Susan Owahdi, it's one thing; if it's the risk management  
13 department for General Motors Corporation, that's  
14 something very different. But then -- and I think most  
15 importantly, it depends upon the nature and the  
16 likelihood of applicability of the exclusion.

17 So if you sell homeowner's insurance in  
18 California, you'd better disclose that earthquake and  
19 flood are not covered. If you sell homeowner's insurance  
20 in Hawaii, you'd better disclose that volcanic eruptions  
21 and hurricanes are not covered. Yes, you can buy special  
22 insurance, but they're not covered in the basic policies.  
23 And if you're insuring a bar and it's got a liquor  
24 liability exclusion in the policy, oops. So really all  
25 you've got is premises liability. You'd better disclose

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1 that. So if it's -- if it's relevant, you've got an  
2 aviation exclusion, typically -- well, if you happen to  
3 know the guy owns an airplane, you've got to talk about  
4 that. But going through each and every exclusion, no.  
5 You could be there all day. But exclusions that may be  
6 relevant.

7 For instance, a rental properties exclusion for  
8 somebody who owns 20 houses, you -- yeah, you've got to  
9 talk about that.

10 Q. Is there any scholarly article or treatise that  
11 you're aware of that says, Broker, this is when you have  
12 that obligation to go over the exclusions, and this is  
13 when you don't?

14 A. I haven't looked for any. I can't tell you  
15 there aren't. Maybe Bob Anderson's book, maybe in some  
16 of the publications from IRMI, I-R-M-I, International  
17 Risk, International Institute of Dallas, Texas, or some  
18 of the other books I have sitting on my bookshelves --  
19 Couch or some of the others. I don't know. It's just so  
20 generally accepted from my 50 years of experience and  
21 custom and practice, I didn't feel it was necessary to go  
22 pull published citations.

23 One problem with those, of course, is that no  
24 two authors precisely agree. We, unfortunately perhaps,  
25 do not have a definitive text on this subject that all of

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1 us experts agree upon. So I have been in cases where I  
2 come up with one citation, and the expert on the other  
3 side comes up with a different citation and somebody else  
4 comes up with a third citation. They're all from highly  
5 reputable professional sources, and they all disagree.  
6 That doesn't really help anybody. So I prefer just going  
7 from the basic custom and practice that is actually my  
8 expertise.

9 Obviously, I did it for 50 years, and I've been  
10 challenged on it to explain why it's the custom and  
11 practice. Does it make common sense to a judge or jury  
12 as to why this is, in fact, the custom and practice and  
13 why not doing it is a violation of the standard of care.

14 Q. All right.

15 A. Long answer to a short question. Sorry.

16 Q. That's okay.

17 MR. BATCHMAN: I don't think I have any further  
18 questions.

19 THE WITNESS: Okay.

20 MR. KASTAN: I have a couple just quick  
21 clarification questions, Don.

22 THE WITNESS: When attorneys say, I have just a  
23 couple --

24 MR. KASTAN: I really do. Trust me. I don't  
25 have the energy to ask you any more than a couple.

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1 REPORTER'S CERTIFICATE

2

3

4 I, NICOLE HATLER, a Shorthand Reporter, State of  
5 California, do hereby certify:

6 That DONALD WAY, in the foregoing deposition  
7 named, was present and by me sworn as a witness in the  
8 above-entitled action at the time and place therein  
9 specified;

10 That said deposition was taken before me at said  
11 time and place, and was taken down in shorthand by me, a  
12 Certified Shorthand Reporter of the State of California,  
13 and was thereafter transcribed into typewriting, and that  
14 the foregoing transcript constitutes a full, true and  
15 correct report of said deposition and of the proceedings  
16 that took place;

17 IN WITNESS WHEREOF, I have hereunder subscribed  
18 my hand this 21st day of September 2016.

19

*Nicole Hatler*

20

NICOLE HATLER, CSR NO. 13730  
State of California

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